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Supreme Court, U. S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No. 72-352

WALTER COLLINS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No.

WALTER COLLINS,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Fifth Circuit, entered on June 1, 1972, affirming the denial of petitioner's motion to vacate sentence pursuant to 28 U.S.C. § 2255.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is set out in the Appendix, *infra,* p. 1a. The order of the District Court denying petitioner's motion to vacate sentence is set out in the Appendix, *infra,* p. 2a. The opinion of the District Court is unreported and is set out in the Appendix, *infra,* p. 3a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 1, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Was the conviction of the petitioner for refusal to submit to induction into the Armed Forces invalid because the petitioner, who sought to file a post-induction claim of conscientious objection, was informed by officials of his local board that the board could not consider such claims, but was not advised of his right to submit to induction and to then assert his claim before the military authorities?

2. Does a Court of Appeals have the authority to set aside a sentence within the maximum statutory limits on the ground that the District Judge failed to apply the principle of individualized sentencing, particularly in the case of a defendant without a prior criminal record who was given the maximum prison sentence for a violation of the Selective Service laws?

CONSTITUTIONAL PROVISION INVOLVED

Amendment V

"No person shall ***be deprived of life, liberty, or property, without due process of law * * *

STATEMENT OF THE CASE

Petitioner was convicted on June 23, 1969, of five counts of refusing to submit to induction into the Armed Forces. He was

sentenced to five years' imprisonment on each count and to pay a fine of $2000, the sentences to run concurrently. His conviction was affirmed by the United States Court of Appeals for the Fifth Circuit, 426 F.2d 765, and certiorari was denied by this Court. 400 U.S. 919. He is currently confined at the federal correctional institution, Texarkana, Texas.

In the present proceeding to vacate his sentence pursuant to 28 U.S.C. § 2255, the petitioner challenged the validity of his conviction and sentence on two grounds not raised heretofore: (1) that the conviction was invalid because he was not advised of his right to submit to induction and assert his post-induction claim of conscientious objection before the military authorities; and (2) the sentence imposed was arbitrary and improper because the District Judge did not apply the principle of individualized sentencing in his case. The facts are not in dispute and the parties agreed in the District Court that an evidentiary hearing was unnecessary, submitting the matter on the basis of the memoranda filed.

After the petitioner received an order to report for induction, he sought to file an application for classification as a conscientious objector. He was advised by the clerk of his local board and by another official that the board could not consider his claim after the order to report had been issued. In view of this advice he did not file the Form 150. At no time was he advised that he could submit to induction and then assert his claim of conscientious objection before the military authorities. (App. 3a-4a).

With respect to the matter of sentence, petitioner had no prior criminal record and was employed by a civil rights organization working to combat racial injustice and poverty in the south. Notwithstanding the District Court imposed the maximum sentence of imprisonment on each count and a $2000 fine. A motion to reduce sentence was denied.

In the proceeding to vacate sentence the District Court resolved both issues against the petitioner and denied the motion to vacate. (App. 6a-8a). The decision was summarily affirmed by the Court of Appeals. (App. 1a).

REASONS FOR GRANTING THE WRIT

I.

The holding on the issue of the local board's duty to advise a registrant who seeks to file a post-induction claim of conscientious objection of his right to submit to induction and then assert his claim before the military authorities is inconsistent with the rationale of this Court's decision in Ehlert v. United States.

It is not disputed that the petitioner sought to file a claim of conscientious objection after he had received an order to report for induction and that he was advised by officials of his local board that the board could not consider the claim. On the basis of that advice he did not file the claim because it would have been futile. But he was never advised that he could submit to induction and then assert his claim before the military authorities. Nor was he advised that while the claim was pending he would not be assigned to combatant training. So far as he knew at the time he refused to submit to induction, there was no way by which his cliam could be considered on the merits. The only alternatives that appeared to be open to him were to submit to induction and to undergo combatant training and service in violation of his beliefs or to face the prospect of a five-year prison term, which he is now serving.

In *Ehlert v. United States,* 402 U.S. 99 (1971), this Court, held that a local board was not required to re-open the classification of a registrant who claimed that his conscientious objection to participation in war crystallized between the mailing of his notice to report for induction and his scheduled

was accepted as controlling. 402 U.S. at 105. More significantly, it was held that the regulation could be so interpreted without prejudice to the rights of the registrant, because he could submit to induction and then present his claim to the military authorities before being required to undergo combatant training. The assurances that the military authorities gave to the Court on this point, 402 U.S. at 107, eliminated the "no man's land" that would bar consideration of such claims. As the Court emphasized:

> "Since such a no man's land would be intolerable, our decision today simply involves settling in which forum late crystallizers must have an opportunity for a ruling on the merits. Whether they must have such an opportunity at all cannot be open to question." 402 U.S. at 104, note 7.

The Court also stated: "If...a situation should arise in which neither the local board nor the military had made available a full opportunity to present a prima facie conscientious objection claim for determination under established criteria...a wholly different case would be presented." 402 U.S. at 107.

But no full opportunity is made available *unless the registrant is informed that he does have the right to present his claim to the military authorities.* The petitioner was never advised that he had the opportunity to have his late crystallization claim determined on the merits, and as he saw

it, the only alternatives were to submit to combatant training and service or to go to prison. Registrants are specifically advised of their rights of review within the Selective Service System itself. See 32 C.F.R. §§ 1623.4(a), 1624.2(d), 1625.12. Where the review of the merits of their claims has been allocated to the military authorities rather than to the Selective Service System, specific advice is even more important, since there has been a departure from the normal method of review.

Where the board or an employee gives misleading and improper advice, as a result of which a registrant fails to appeal or to exercise other procedural rights, there has been a violation of due process, invalidating the order to report. See *e.g., Powers v. Powers*, 400 F.2d 438 (5th Cir., 1968); *United States v. Williams*, 420 F.2d 288 (10th Cir., 1970); *United States v. Burns*, 431 F.2d 1070 (10th Cir., 1970); *United States v. Fisher*, 442 F.2d 109 (7th Cir., 1971). Here the petitioner was in effect given misleading advice when he was informed by the board officials that the board could not receive a post-induction claim of conscientious objection. On the basis of the advice he received he could only believe that he would have no opportunity to have his conscientious objection claim determined on the merits.

Moreover, affirmative duties have also been placed upon a board, such as advising a registrant that an appeal agent is available, *United States v. Davis*, 413 F.2d 148 (4th Cir., 1969), advising him to complete the Form 150 when it appears that he may be entitled to classification as a conscientious objector, *United States v. Sobczak*, 264 F. Supp. 752 (N.D. Ga. 1966) or assisting him in completing the Form if this appeared to be necessary to enable him to file it in time, *United States v. Seeley*, 301 F. Supp. 811 (D.R.I. 1969). The duty to take affirmative action is not limited to board members, but also extends to military personnel at

processing stations, since this processing is a part of the overall induction process. See the discussion in *Briggs v. United States, 397 F.2d 370, 373 (9th Cir., 1968).*

To hold that the local board is not required to advise a registrant who seeks to file a post-induction claim of conscientious objection that he has the right to submit to induction and then assert his claim before the military authorities completely undercuts the rationale of the decision in *Ehlert.* This Court emphasized in *Ehlert* that there could not be a "no-man's land" with respect to post-induction conscientious objection claims and that there could be no possibility that "late crystallizers will find themselves without a forum in which to press their claims." But the "no man's land" will exist unless registrants are advised of their rights by the local board when the board informs them that it cannot hear the claim on the merits. The failure to give such advice, it is submitted, violates important procedural rights of the registrant, thereby depriving him of due process of law and rendering invalid the order to report. *C.F. Mulloy v. United States,* 398 U.S. 410 (1970).

The holding on this issue by the Court of Appeals and the District Court is in conflict with the clear thrust of *Ehlert.* At a minimum the issue involves an important question of selective service law which should be settled by this Court. Certiorari should be granted in order to resolve this issue and to make clear whether registrants with late-crystallizing claims of conscientious objection will in reality have the forum to assert their claims that this Court envisioned when it decided *Ehlert.*

II.

The holding of the Court of Appeals for the Fifth Circuit to the effect that it will not review a sentence within statutory limits that has been imposed on a selective service violator is in direct conflict with holdings of the Court of Appeals for the Sixth Circuit on the same matter.

In the case at bar the Court of Appeals for the Fifth Circuit again refused to review a sentence within statutory limits that had been imposed on a selective service violator, citing its decision in *United States v. Saunders*, 435 F.2d 683 (5th Cir., 1970). The imposition of the maximum prison sentence and a substantial fine in the case of a defendant such as the petitioner who had no prior criminal record, can in no way be reconciled with the principle of individualized sentencing promulgated by this Court in *Williams v. New York*, 337 U.S. 241, 248 (1949). The petitioner was employed by a civil rights organization working to combat racial injustice and poverty in the south and had been very active in the anti-war movement for some time before he was ordered to report for induction. All of this was known to the District Judge, who still imposed the maximum prison sentence and a substantial fine.[1]

Recent sentencing figures from the Administrative Office of the United States Courts indicate that over half of all Selective Service violators have had their sentences *probated*. In fiscal 1970, for example, the majority of men convicted of selective service violations were given probation (573 out of 1029). 4 *Sel. Serv. L. Rep.* 10 (1971). Prison sentences averaged 33.5 months. In fiscal 1971, only 377 out of 1036 convicted men were sentenced to imprisonment, and the term averaged 29.1 months. The rest were probated. 4 *Sel. Serv. L. Rep.* 70 (1972).

[1] Although the petitioner was convicted on five counts of refusing to submit to induction, he reported on each of the days he was ordered to and was ejected from the induction center because he carried anti-war literature. The substance of the conviction related to his refusal to submit to induction. This was recognized by the District Judge with respect to the prison sentences, which he ordered to run concurrently.

The sentencing disparity in selective service cases and the practice of some District Judges in repeatedly imposing the maximum sentence has led the Court of Appeals for the Sixth Circuit to review such cases to determine whether the District Judge properly applied the principle of individualized sentencing. Where he has not, that Court has remanded the case for proper sentencing and has even gone so far as to order probation. See *United States v. Daniels*, 429 F.2d 1273 (6th Cir., 1970); *United States v. Daniels*, 446 F.2d 967 (6th Cir., 1971); *United States v. McKinney*, 427 F.2d 449 (6th Cir. 1970). *United States v. McKinney*, F.2d , No. 71-1563, 6th Cir., Dec. 17, 1971.

The power of federal appellate courts to exercise supervisory control over the District Courts in the matter of sentencing is clear, since such control is "necessary to proper judicial administration in the federal system." *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 253 (1957). The exercise of such control is particularly appropriate in selective service cases, since very frequently, as in the case at bar, the defendant will have refused to submit to induction as an act of conscience and is likely not to have a prior criminal record. The principle of individualized sentencing should prohibit the imposition of a maximum prison term in such a case.

The refusal of the Court of Appeals for the Fifth Circuit to review the sentence imposed upon a selective service violator so long as it is within the statutory limits is in direct conflict with the holdings of the Court of Appeals for the Sixth Circuit in such cases. Certiorari should be granted to resolve the conflict and to determine whether Courts of Appeals are required to review sentences imposed on selective service violators where there has been an apparent departure from the principle of individualized sentencing.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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OPINION OF THE COURT OF APPEALS

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1554

Summary Calendar*

WALTER COLLINS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

(June 1, 1972)

Before BELL, DYER and CLARK, Circuit Judges.

PER CURIAM: AFFIRMED.[1] See Local Rule 21.[2]

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*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1]There is no merit to Collins' contention that there is an affirmative duty on local draft boards to advise registrants who attempt to claim conscientious objector status after an induction notice that they have the right to submit to induction and then assert a claim of conscientious objection. Equally without merit is Collins' argument that his sentence, which was far less than the maximum statutory imposable sentence, was arbitrary and improper. *United States v. Saunders*, 5 Cir. 1970, 435 F.2d 982.

[2]See NLRB v. Amalgamated Clothing Workers of America, 430 F.2d 966

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ORDER OF THE DISTRICT COURT

U. S. DISTRICT
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

WALTER COLLINS — NO. 71-1882

versus — CIVIL ACTION

UNITED STATES — SECTION D

J U D G M E N T

The Court having, on January 7, 1972, denied the motion of petitioner to vacate sentence,

Therefore;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor or respondent, The United States, and against the petitioner, Walter Collins, dismissing this cause.

New Orleans, Louisiana, this 16th day of February 1972.

UNITED STATES DISTRICT JUDGE

William H. Allison, Esq.
Robert Allen Sedler, Esq.
Benjamin E. Smith, Esq.
Robert L. Livingston, Jr., Esq.

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COPY RE

OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

WALTER COLLINS	*	**CIVIL ACTION**
	*	
versus	*	**NUMBER 71-1882**
	*	
UNITED STATES	*	**SECTION "D"**

ORDER

WALTER COLLINS seeks to vacate under 28 USC 2255 a five-year sentence imposed upon him on July 9, 1969. The petitioner was charged in a six-count indictment for violating Title 50 App. United States Code, Section 462 (a). A jury found the petitioner innocent on Count 1 and guilty on Counts 2,3,4,5 and 6. The Court sentenced petitioner to five years on Count 4; five years and $500.00 on Count 2; five years and $500.00 on Count 3; five years and $500.00 on Count 5; and five years and $500.00 on Count 6. Sentence imposed on Counts 2,3,5, and 6 were to run concurrently with sentence imposed on Count 4.

Agreeing that an evidentiary hearing was unnecessary, counsel for the parties submitted the matter for adjudication on the memoranda filed.

Petitioner claims the conviction and sentence pursuant to which he is being detained was imposed in violation of the Due Process Clause of the 5th Amendment to the Constitution of the United States in that:

OUND CLOSE IN CENTER

(a) The petitioner who sought to claim classification as a conscientious objector after the order to report for induction was issued was never advised by his Selective Service Local Board that he could assert his claim for conscientious objection before the military authorities after having submitted to induction:

(b) The sentence of five years' imprisonment imposed upon the petitioner in arbitrary and discriminatory, since other persons in similar circumstances who have refused to submit to induction have had their sentences probated on condition that they perform civilian work similar to that done by registrants who have been classified I–O.

Petitioner contends that the rationale of *Ehlert v. United States,* 91 S.Ct. 1319 (1971) imposed an affirmative duty on Local Draft Boards to advise registrants of their rights to submit to induction and then assert their claim of conscientious objection.

Petitioner admits the board was correct in telling him it could not consider his post-induction claim of conscientious objection. However, petitioner contends that the silence of the Draft Board in advising him of his right to file his conscientious objection claim after submitting to induction amounted to false and misleading information which was in violation of due process. Citing *Powers v. Powers,* 400 F.2d 438 (5th Cir. 1968); *United States v. Williams,* 420 F.2d 288, (10th Cir. 1970).

On ruling on the regulation that petitioner attacks here, the *Ehlert* Court said:

> "(1,2,) A regulation explicitly providing that no conscientious objector claim could be considered by a local board unless filed before the mailing of an induction notice would, we think, be perfectly valid, *provided that no inductee could be ordered*

to combatant training or service before a prompt, fair, and proper in-service determination of his claim. The Military Selective Service Act of 1967 confers on the President authority 'to prescribe the necessary rules and regulations to carry out the provisions of this title***.' 50 U.S.C. App. § 460 (b) (1). To read out of the authority delegated by this section the power to make reasonable timeliness rules would render it impossible to require the submission,' before mailing of an induction notice, of a claim matured before that time. *The System needs and has the power to make reasonable timeliness rules for the presentation of claims to exemption from service.*[4]

A regulation barring post-induction notice presentation of conscientious objector claims, with the proviso mentioned *would be entirely reasonable as a timeliness rule.* Selective Service boards must already handle prenotice claims, and the military has procedures for processing conscientious objector claims that mature in the service. *Allocation of the burden of handling claims that first arise in the brief period between notice and induction seems well within the discretion of those concerned with choosing the most feasible means for operating the Selective Service and military systems. Further, requiring in-service presentation of post-notice claims would deprive no registrant of any legal right and would not leave a 'no man's land' time period in which a claim then arising could not be presented in any forum.*

(3,4) The only unconditional right conferred by statute upon conscientious objectors is exemption from combatant training and service.[5] The Selective Service law, indeed, provides for noncombatant training and service for those objectors to whose induction there is no obstacle.[6] The right to civilian service 'in lieu of ***induction' arises only if a registrant's "claim is sustained by the local board.' *It does not follow, given the power to make reasonable timeliness rules, that a registrant has an unconditional right to present his claim to the local board before induction, any more than he has such a right after induction.* Congress seems rather carefully to have confined the unconditional right created by the statute to immunity from combatant training and service. Consequently, requiring those whose conscientious objection has not crystallized until after their induction notices to present their claims after induction would work no deprivation of statutory rights, so long as the claimants were not subjected to combatant training or service until their claims had been acted upon." EMPHASIS MINE

Since the Supreme Court has upheld the regulation that a conscientious objector claim could not be considered by Local Board unless filed before mailing of an induction notice, and since *Ehlert,* supra', the case on which petitioner relies to attack his conviction *does not* place an affirmative duty on Local Draft Boards to advise registrants that they have the right to submit to induction and then assert his claim of conscientious objection, and further, since the Draft Board's silence on this matter *does not* prejudice the right of a registrant as false and misleading information does, the

relief sought on these grounds is denied. See also *Gee v. United States, No. 71-1063*, _F.2d_ (5th Cir. December 22, 1971).

Petitioner also attacks his conviction and sentence on the grounds that a sentence of five years imprisonment is arbitrary and discriminatory.

A sentence may not be attacked for its severity if the sentence is within the statutory limits. *Putt v. United States*, 363 F.2d 369 (5th Cir. 1966); *United States v. Saunders*, 435 F.2d 683 (5th Cir. 1970).

A sentence imposed within the maximum prescribed by statute not subject to collateral attack by way of motion to vacate sentence. *Steele v. United States*, 362 F.2d 536 (10th Cir. 1966).

The penalty for violating 50 App. United States Code, Section 462 (a) is five years imprisionment and/or a $10,000.00 fine. On being found guilty of five counts of violating 50 App. United States Code, Section 462 (a), the statutory maximum the Court could have sentenced petitioner to was twenty-five years and a $50,000.00 fine, so a five-year sentence and a $2,000.00 fine is within the maximum prescribed by statute, cannot be considered arbitrary, discriminatory or severe, and may not be collaterally attacked.

For the above reasons,

IT IS ORDERED that the motion to vacate sentence filed by petitioner, Walter Collins, be and it is herewith DENIED.

New Orleans, Louisiana, this 7th day of January, 1972.

UNITED STATES DISTRICT JUDGE

MOTION TO VACATE SENTENCE

IN THE
UNITED STATES DISTRICT COURT
For the Eastern District of Louisiana

WALTER COLLINS,	)	
	)	
Petitioner	)	
	)	NO.
VS.	)	
	)	
UNITED STATES	)	
	)	
Respondent	)	

MOTION TO VACATE SENTENCE

Comes now the petitioner, WALTER COLLINS, and moves this Court pursuant to 28 U.S.C. § 2255 to enter an order vacating his sentence. In support of this Petition petitioner shows to the Court as follows:

1. Petitioner is presently serving a sentence of five years' imprisonment and a fine of $2000 for refusal to submit to induction into the Armed Forces of the United States in violation of 50 App. U.S.C. § 462(a). Sentence was imposed by this Court on June 23, 1969. Petitioner's conviction was affirmed by the United States Court of Appeals for the Fifth Circuit, and certiorari was denied by the Supreme Court. Petitioner is confined at the federal correctional institution, Texarkana, Texas.

2. The conviction and sentence pursuant to which petitioner is being detained was imposed in violation of the Due Process clause of the Fifth Amendment to the Constitution of the United States in that:

(a) The petitioner who sought to claim classification as a conscientious objector after the order to report for induction was issued was never advised by his selective service local board that he could assert his claim for conscientious objection before the military authorities after having submitted to induction;

(b) The sentence of five years' imprisonment imposed upon the petitioner is arbitrary and discriminatory, since other persons in similar circumstances who have refused to submit to induction have had their sentences probated on condition that they perform civilian work similar to that done by registrants who have been classified I-O.

3. Because of the foregoing facts petitioner is being restrained of his liberty by the respondent in violation of the constitution of the United States.

WHEREFORE, he prays that this motion be granted and an order entered vacating his sentence.

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BY:

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-352

WALTER COLLINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a) and of the district court (Pet. App. 3a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1972. The petition for a writ of certio-

rari was filed on August 30, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a local selective service board must advise a registrant who indicates a desire to make a post-induction-notice conscientious objector claim that he can obtain in-service review of such a claim after induction.

2. Whether the court of appeals erred in not reviewing petitioner's sentence, which was concededly within lawful limits.

STATEMENT

This is a collateral proceeding under 28 U.S.C. 2255 in which petitioner challenges his conviction and sentence for various Selective Service law violations. After his 1969 jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of five counts of refusing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462(a). He was sentenced to five years' imprisonment on each count, the sentences to run concurrently, and he was fined $2,000. The court of appeals affirmed *per curiam*. 426 F. 2d 765. Certiorari was denied. 400 U.S. 919.

In the present action, petitioner seeks to have his sentence vacated under 28 U.S.C. 2255, on the grounds (1) that the conviction was invalid because he had not been advised by his local board of his

right to present his late-crystallizing claim of conscientious objection to the military authorities after induction and (2) that the sentence did not reflect individualized consideration. The district court denied the motion to vacate, holding that the local boards have no affirmative duty to inform registrants of their right to in-service review of post-notice conscientious objector claims and that a sentence within the statutory maximum is not subject to collateral attack under 28 U.S.C. 2255 (Pet. App. 3a-7a). The court of appeals affirmed *per curiam* (Pet. App. 1a).

The facts are not in dispute. Petitioner registered with his local board on December 11, 1962, and was thereafter classified II-S as a student until January 1967, when, having completed his college studies, he was classified I-A. In June 1967, petitioner passed the pre-induction physical.

Petitioner was thereafter ordered to report for induction on six occasions, three times in 1967 (September, October and December) and three times in 1968 (January, February and March). On each occasion, he either failed to report or failed to submit to induction. On December 12, 1967, the day when his third order to report for induction was issued, petitioner first indicated that he might be a conscientious objector by requesting and obtaining from the local board the special form for conscientious objectors. However, he was advised that the local board could not consider a post-notice conscientious objector claim, and he never returned the completed form to the local board. Following his failure to report for

induction in March 1968, petitioner was indicted on six counts of failure to report for and submit to induction, and he was convicted on five of those counts.[1]

ARGUMENT

1. Petitioner contends (Pet. 4-7) that the absence of advice from his local board that he could obtain in-service review of a post-notice conscientious objector claim constitutes a denial of due process which invalidates his convictions. This contention was properly rejected by the courts below and warrants no further review.

No decision of this Court imposed an affirmative responsibility on the local board to inform petitioner of the opportunity for in-service review. The absence of such advice to petitioner should not invalidate the induction orders which had previously issued nor should it render the subsequent orders unenforceable. Upon receipt of those orders petitioner had a duty to report for and submit to induction. 32 C.F.R. 1632.14. His failure to satisfy that duty should not be excused simply because he was not expressly informed of a post-induction right that would have been accorded by military authorities.

In *Ehlert* v. *United States*, 402 U.S. 99, this Court held that the requirements of due process are satisfied by the provision of in-service review of post-

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[1] Petitioner explained that he did not receive the order for September 1967 until after the scheduled reporting date, and he was acquitted on the count charging him with failure to report for induction in that month.

notice conscientious objector claims and that such claims therefore need not be reviewed by the local boards. In doing so the Court made no mention of an additional local board responsibility for informing registrants about in-service review, and approval of the current local board practice of declining to review post-notice claims was not conditioned on the giving of such notice. Petitioner now argues that there still exists a "no man's land" where registrants who, uninformed of their in-service rights, have refused induction and thus may not secure any review of their claims. But this argument overlooks the facts that under *Ehlert* the local board was correct in informing petitioner that it would not consider a post-notice claim and that petitioner's claim went unreviewed solely due to his own failure to submit to induction.

Moreover, petitioner does not claim that he was unaware of the opportunity for in-service review or that he was prejudiced by the local board's failure to inform him of that right. Petitioner was represented by counsel during December 1967, when he first indicated to his local board an interest in being classified as a conscientious objector (SSF 80-82),[2] and his decision not to submit to induction was therefore presumably a well-informed one. Furthermore, by that date petitioner had already twice failed to report for and submit to induction, and the local

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[2] "SSF" refers to petitioner's Selective Service file which is part of the record lodged with the Clerk of this Court.

board's failure in December 1967 to inform him concerning post-induction rights could not affect the validity of his conviction for failure to report for induction in October 1967.[3] See, *e.g.*, *Noonan* v. *United States*, 434 F. 2d 582 (C.A. 3), certiorari denied, 401 U.S. 981.

2. Petitioner also contends (Pet. 7-9) that the court of appeals erroneously refused to review his sentence. The court, however, expressly considered, and rejected, his claim "that his sentence, which was far less than the maximum statutory imposable sentence, was arbitrary and improper" (Pet. App. 1a, n. 1).[4] In doing so, the court cited its earlier decision in *United States* v. *Saunders*, 435 F. 2d 683, where the applicable rule in such cases had been correctly stated to be that where no abuse of discretion is shown, a sentence within the statutory limits will be upheld. This is also the rule applied by the Court of Appeals for the Sixth Circuit in the cases cited by petitioner (Pet. 9), and there is thus no conflict on this issue.

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[3] Concurrent sentences were imposed for each failure to submit to induction.

[4] Under the statute, petitioner could have been sentenced to a maximum of twenty-five years' imprisonment and fined $50,000. He was in fact sentenced to five years' imprisonment and fined $2,000 (Pet. App. 7a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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